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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

THE KING'S GARDEN, INC.,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner King's Garden, Inc. asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 10, 1968, denying petitions to review certain Orders of the Federal Communications Commission.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, is included at page 119 of the Appendices.[1] The

[1] In addition to King's Garden, Inc. other parties to the proceeding in the Second Circuit (i.e. Association on Broadcasting Standards, Inc., American Broadcasting Companies, Inc., May Broadcasting Company and WBEN, Inc.) are also seeking certiorari and a joint document entitled Appendices to Petition For Writs of Certiorari to the United States Court of Appeals for the second circuit is being filed.

Report and Order of the Federal Communications Commission adopting the revised Rules in issue is reported at 8 F.C.C. 2d 698 (1967) and appears at page one of the Appendices. The Memorandum Opinion and Order of the Federal Communications Commission denying petitions for reconsideration is reported at 10 F.C.C. 2d 283 (1967) and appears at page 61 of the Appendices.

JURISDICTION

The judgment of the Court of Appeals here sought to be reviewed (Appendices, page 118(a)) was entered May 10, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS FOR REVIEW

Whether a station's existing hours of broadcast and power may be reduced by the Federal Communications Commission without an evidentiary hearing.

Whether in determining to reduce the hours and power of broadcast stations the Federal Communications Commission may disregard the programs which are broadcast by such stations and the needs of the public for such programs.

STATUTES AND REGULATIONS

Sections 303(f) and 316(a) of the Communications Act of 1934, as amended, 47 U.S.C. 303(f) and 316(a) provide:

"Section 303(f): [The Commission shall] Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: Provided, however, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with."

"Section 316(a): Any station license or construction permit may be modified by the Commission either for

a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue; Provided, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.".

Section 73.87 of the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. 73.87 formerly provided in pertinent part:

"Section 73.87 Program transmissions prior to local sunrise

(a) The provisions of [other sections not here pertinent] shall not prevent the transmission of programs between 4 o'clock a.m. local standard time and local sunrise, of standard broadcast stations with their authorized daytime facilities . . .

(b) Any station operating during such hours receiving notice from the Commission that undue interference is caused shall refrain from such operation during such hours pending further notice from the Commission."

Section 73.99 of the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. 73.99 provides in pertinent part:

"73.99 Presunrise service authority

(a) . . . the following classes of standard broadcast permittees and licensees are eligible to request presunrise service authority (PSA):

(2) Class III stations.

(b) When issued, a PSA will permit:

(2) Class III stations to commence operation with their daytime antenna systems at 6 a.m. local standard time, and to continue such operation until local sunrise: Provided, That the permissible power, to be specified in the PSA, shall not exceed 500 watts or such lesser power as may be determined on the basis of calculations made pursuant to paragraph (c) of this section.

(c)(3) For Class III stations, a showing that cochannel stations in foreign countries will receive full treaty protection. If such protection cannot be achieved on the basis of 500-watt operation, calculations may be submitted to establish the level to which power must be reduced to preclude objectionable interference: Provided, That with respect to Canadian Class III stations, such power level may be established by a showing that the radiation at the pertinent vertical angle toward cochannel Canadian stations does not exceed that defined in Figure 12 of § 73.190. If the latter showing cannot be made on the basis of 500-watt operation, calculations may be submitted to establish the level to which power must be reduced in order to limit radiation at the pertinent vertical angle to the values specified in Figure 12 of § 73.190."

STATEMENT OF FACTS

Background as to Petitioner and KGDN

Petitioner, the King's Garden, Inc., is the licensee of standard broadcast station KCDN located at Edmonds, Washington, just outside the city of Seattle, Washington.

The King's Garden, Inc. is a non-profit inter-denominational religious organization which serves the Seattle area. It has four religious schools, a senior citizen community, two homes for boys, youth Bible clubs, and a service organization dedicated to the social betterment and moral enrichment of the Seattle area. In accordance with that objective,

the King's Garden operates station KGDN with a non-denominational religious-oriented program format.

Station KGDN, which began broadcasting in 1954, is a Class III, Regional Broadcast Station, which under the Federal Communications Commission's Rules[2] is ". . . a station which operates on a regional channel and is designed to render service primarily to a principle center of population and the rural area contiguous thereto".

KGDN operates on the frequency of 630 kilocycles. When KGDN began operating in 1954, it operated with a power of one thousand (1,000) watts. In 1959, upon application by the King's Garden, the Commission found it to be in the public interest, convenience, and necessity to increase KGDN's operating power to five thousand (5,000) watts, at which power the station has been operating since that time. With its power of five thousand (5,000) watts, KGDN serves a population of some 706,821 persons in a wide area of 531 square miles surrounding Edmonds.

At the time KGDN began broadcasting in 1954, and up until the very recent Commission actions under review herein, KGDN was permitted under the Commission's Rules to begin broadcasting at 5:00 a.m. each morning, with its full authorized power. Such operation was fully authorized by the provisions of Section 73.87, 47 C.F.R. 73.87, of the Commission's Rules which provided in effect that a station could begin operating as early as 4 a.m. with its full authorized power if it did not cause any "undue interference" to any other broadcast station. This operation in the early morning hours before local sunrise is referred to as a pre-sunrise operation. Since KGDN's early morning pre-sunrise operation did not in fact cause any "undue interference" to other broadcast stations, it has continually operated during these pre-sunrise hours with its full authorized power for the past thirteen years. The present license of

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[2]Section 73.21(b)(1), 47 C.F.R. 73.21(b)(1).

KGDN was renewed by the Commission as of February 1, 1966 and expires on February 1, 1969.

The amount of time involved in KGDN's pre-sunrise operation is substantial. Thus, sunrise occurs at Edmonds, Washington, at the following times during the year:

January	8:00 a.m.
February	7:15 a.m.
March	6:30 a.m.
April	5:30 a.m.
May	4:30 a.m.
June	4:15 a.m.
July	4:30 a.m.
August	5:00 a.m.
September	5:45 a.m.
October	6:30 a.m.
November	7:15 a.m.
December	7:45 a.m.

Thus, during eight months of the year KGDN's customary sign-on time of 5:00 a.m. occurs prior to local sunrise, and KGDN's pre-sunrise operation totals some 439 hours per year. KGDN is required to terminate its broadcast day at local sunset,[3] and during certain months, particularly October through March, sunset occurs quite early. Thus, during those months KGDN operates with a shortened broadcast day and its pre-sunrise operation constitutes a substantial portion of its total broadcast day.

By its Orders and related Rules herein, the Commission would effectively eliminate KGDN's pre-sunrise operation. Specifically, if the Commission is upheld KGDN could not commence broadcasting with its full authorized power of 5,000 watts until local sunrise. The Commission's revised

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[3] Local sunset at Edmonds, Washington occurs at the following times: January, 4:45 p.m.; February, 5:30 p.m.; March, 6:15 p.m.; April, 7:00 p.m.; May, 7:45 p.m.; June, 8:15 p.m.; July, 8:00 p.m.; August, 7:30 p.m.; September, 6:30 p.m.; October, 5:30 p.m.; November, 4:30 p.m.; December, 4:15 p.m.

Rules would permit KGDN to begin pre-sunrise broadcasting at 6:00 a.m., with a power of 58 watts.[4] However, 58 watts of power is far below the minimal required for effective operation, and KGDN has determined that it cannot operate at that power. Hence, the true impact of the revised Rules is to completely terminate KGDN's pre-sunrise operation. The loss of KGDN's pre-sunrise broadcasts will severely injure the public and the King's Garden, Inc., and it is to prevent such public and private injury that judicial relief has been sought.

The public has come to rely upon the unique pre-sunrise programming of KGDN. Since its inception in 1954, Station KGDN has attempted to fulfill the spiritual needs of the listeners of its service area by providing a high quality program format of spiritually uplifting religious programs. This is done especially during the early morning hours because it is the only time of the day many persons have an opportunity to listen to these programs. The availability of KGDN's programming during these particular hours of pre-sunrise is especially important by reason of the substantial number of persons throughout the area whose day, and that of their families, starts early to permit them to travel to work at Boeing and other industrial plants in the Seattle area.

THE COMMISSION'S ACTIONS UNDER REVIEW

In a Report and Order[5] released July 13, 1967, the Commission concluded a Rule-Making proceeding by changing its Rules relating to pre-sunrise operation of standard broadcast stations. The changed Rules, among other things, would effectively abolish KGDN's pre-sunrise operation. Petitions for reconsideration of the changed Rules were denied by the Commission in a Memorandum Opinion and Order, 10 F.C.C. 2d 283, released October 17, 1967.

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[4] As a result of the calculations specified in Section 73.99(c)(3), 47 C.F.R. 73.99(c)(3) of the revised Rules.

[5] 8 F.C.C. 2d 698.

The Rule-Making proceeding which led to the revised Rules provided for written comments only. There were no evidentiary hearings, nor were there any oral presentations or argument before the Commission.

The primary impact of the change in Commission regulations upon KGDN's operation was to specify that KGDN could not begin broadcasting with its full authorized power of five thousand (5,000) watts until local sunrise. The Commission's Rules did provide that KGDN could begin broadcasting at 6:00 a.m. with a power of 58 watts, but that obviously low power would not permit KGDN to even cover the entire city of Edmonds, Washington, much less any wider area, and in fact would eliminate over 90% of its coverage area. In point of fact, the Commission considers 500 watts to be the absolute minimum power for Class III AM radio stations such as KGDN. Operation at 58 watts is so impractical and would be so destructive of the station's good will that KGDN could not operate at that power level. Thus, the true impact of the Commission's Orders is that KGDN would have no early morning pre-sunrise operation.

Faced with the disruption of its long-standing pre-sunrise operation, the King's Garden on October 24, 1967, petitioned the Commission for a waiver of its revised Rules to permit it to continue to operate as it had for the previous thirteen years with full authorized power pre-sunrise, or to at least permit a hearing on the waiver request. The King's Garden also requested the Commission to hold an evidentiary hearing as required, it was contended, by Section 316(a) of the Communications Act of 1934, as amended. In a telegram dated November 1, 1967,[6] the

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[6]The telegram stated:
"November 1, 1967

Radio Station KGDN
Edmonds, Washington

Relet Atty 27. Regret PSA power in excess of that permitted by foreign protection considerations not grantable. Reasons sufficient, if true, to justify waiver have not been alleged. Refer agreement with

Commission denied all of the King's Garden's requests for relief and hearing.

SUBSEQUENT COURT PROCEEDINGS

The King's Garden, pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2342 and 2343, petitioned for review of the Commission's actions, first in the United States Court of Appeals for the Ninth Circuit and then, in accord with 28 U.S.C. 2112, in the Court of Appeals for the Second Circuit where WBEN, Inc. had earlier initiated a petition for review, and where other related petitions for review were pending. Subsequently, all the petitions for review of these Commission actions pending in the Second Circuit were consolidated for oral argument and the judgment of which review is sought in this Court.

REASONS FOR GRANTING THE WRIT

By its actions under review, the Federal Communications Commission would effectively terminate a unique broadcast service rendered by station KGDN during the pre-sunrise hours for the past thirteen years. Yet the Commission decreed this reduction in public service without affording KGDN an evidentiary hearing and without considering programming or programming needs. The Commission actions present important questions of federal law which are of wide applicability, of public importance, and which should be settled by this Court.

Canada formalized June 12, 1967, and final agency decisions of June 28 (FCC 67-767) and October 11 (FCC 67-1143). Therefore necessary that you either operate accordance terms of station license or, if pre-sunrise sign-on is continued, that power be reduced to 57 watts per Comtel October 17. Refer Section 73.87 and 73.99 Rules. Request for evidentiary hearing and petition for waiver, both filed October 24, 1967, hereby denied.

George S. Smith, Chief Broadcast Bureau Federal Communications Commission"

First, the question of whether an evidentiary hearing was required. Section 303(f) of the Communications Act of 1934, as amended, 47 U.S.C. Section 303(f), provides in essence that changes in the authorized power and times of operation of any broadcast station shall not be made by the Commission without consent of the station licensee unless it is determined after a public hearing that such changes will promote the public interest, convenience and necessity.[7] Here it was clear and not disputed that the Commission's actions had substantially changed and reduced KGDN's power and times of operation. There thus arises the question as to the applicability of Section 303(f).

Further, Section 316(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 316(a) specifically prohibits the Commission from modifying an outstanding station license in any respect until after a public hearing is held to determine whether such a modification would be in the public interest.[8] Closely related is the holding in *FCC*

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[7] "Section 303(f): Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: Provided, however, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with."

[8] "Section 316(a): Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by

v. National Broadcasting Corporation (KOA), 319 U.S. 239 (1943) wherein this Court held that the Commission's Rules as they exist at the time the station's license is granted are incorporated into the terms of that license, 319 U.S. at 245.

Former Section 73.87 of the Commission's Rules, which permitted KGDN to go on the air as early as 5:00 a.m. with full power and to continue to so broadcast absent a specific complaint of "undue interference" during these pre-sunrise hours, was in effect when KGDN was first licensed in 1954 and when its license was renewed in 1957, 1960, 1963, and most recently, 1966, when KGDN's current license renewal was granted. There has never been a complaint against KGDN as to its pre-sunrise operation. Thus, the Commission's actions under review clearly modified KGDN's license as it incorporated the provisions of former Rule 73.87. Yet the Commission acted without the public hearing guaranteed by Section 316(a). There thus arises the question as to the applicability of Section 316(a).

The Commission and in turn the Court below were of the view that the hearing rights guaranteed to licensees under Section 303(f) and Section 316(a) were not available here. In addition, the holding of this Court in *FCC v. National Broadcasting Corporation (KOA), supra.* was construed by the Court below as requiring no hearing.

It is appropriate to point out that questions posed are substantial. Thus, in finding that neither Section 303(f) nor Section 316(a) was applicable, the Court below construed those provisions quite narrowly. Thus, Section 316(a) was limited in its reach to cases peculiar to an individual licensee and that where Rule-Making is employed, Section 316(a) has no applicability. Contrary to the Court's holding, the language of Section 316(a) is broad and explicit and contains no suggestion whatsoever that it does

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public hearing, if requested, why such order of modification should not issue: Provided, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice."

not apply where the modification is decreed by Rule-Making. Nor does the Court rest its construction upon the legislative history of Section 316(a). Instead, the Court appears to base its construction on the general theory that Rule-Making is a vital part of the administrative process which should not be inhibited by evidentiary hearing requirements. Section 303(f) was similarly restrictively construed.

These holdings—central to the Second Circuit's decision—present the most fundamental questions as to hearing rights available to parties before administrative agencies and as to the manner in which these agencies perform their statutory obligations. The Second Circuit decision directly affects not only the licensees of the Federal Communications Commission but also all other parties who hold similar authorizations from federal administrative agencies. Hearing rights are the licensee's most important safeguard against arbitrary or capricious or uninformed agency action. Most importantly, an evidentiary hearing permits a licensee to avoid being swept up in a monolithic Rule-Making proceeding where its own case and merits are far too often lost or neglected by reason of the sheer magnitude of the proceeding.

Perhaps the Second Circuit is correct in holding that hearing rights must give way to the administrative expediency of Rule-Making. But the statute does not so state nor does any decision of this Court. If such a fateful determination is to be made, it is respectfully submitted that it should be by this Court.

The second important question of federal law presented concerns whether it was proper for the Commission in rendering its decision to disregard the programming of the stations affected and the needs of the public for such programming. This was particularly critical to KGDN since it is the only standard broadcast station in the entire Seattle area offering religious programming during the pre-sunrise hours, a unique service of particular interest to the many persons whose day and that of their families starts early to accommodate work in the industrial plants in the Seattle

area. Yet KGDN's unique programming and that of other stations was ignored by the Commission. The Court below sanctioned this disregard for programming on the grounds of the alleged administrative burden involved and the subjective nature of programming. This is an area, the Court concluded, where the Commission may decline to consider programming.

The abandonment of programming and programming needs as decisional criteria is most significant. First, it runs counter to the traditional and often stated view as to the importance to the public interest of the programs which are broadcast and the needs therefor, cf. *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351 (C.A.D.C., 1949); *Commission En Banc Programming Inquiry*, 25 Fed. Reg. 7291 (1960). Also consider *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1942) where this Court stated at pp. 215-216:

> "Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. *But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.*" (emphasis added)

Here the Commission has acted solely as a "supervisor of traffic" and has consciously eschewed any thought of dealing with the "composition of that traffic". What then of the responsibility referred to above. Perhaps the Second Circuit is correct in upholding the Commission's avoidance of programming considerations and affirming a Commission decision based upon a wholly technical analysis. But the question of whether programming is to be read out of the public interest, warrants, it is respectfully submitted, the consideration of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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